Supreme Court, U.S.
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No. 03-790

IN THE

Supreme Court of the United States

SAFETY NATIONAL CASUALTY CORPORATION,

Petitioner,

v.

DOW CORNING CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

David E. Finkelson
RAY QUINNEY & NEBEKER
36 South State Street
Suite 1400
Salt Lake City, UT 84111
(801) 532-1500

Mitchell F. Dolin
Counsel of Record
Robert A. Long
R. Laird Hart
Benjamin C. Block
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

Attorneys for Respondent

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QUESTIONS PRESENTED

1. Whether the court of appeals, in accord with every other court of appeals to have decided the issue, correctly held that an agreement providing for non-binding arbitration is enforceable.

2. Whether the parties intended a court, rather than the arbitrators, to decide whether the arbitration decision in this case is binding or non-binding.

PARTIES TO THE PROCEEDING AND RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding are named in the caption. The following publicly held companies own 10 percent or more of Dow Corning Corporation's stock: Dow Chemical Company and Corning, Inc.

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STATEMENT OF THE CASE

This case concerns an arbitration clause in insurance policies issued two decades ago by Petitioner Safety National Casualty Corporation ("Safety") to Respondent Dow Corning Corporation ("Dow Corning"). Dow Corning seeks $9.15 million in coverage under the policies for a portion of its massive breast-implant liabilities. Reserving its right under the arbitration clause to pursue the claim in litigation, Dow Corning first submitted the matter to arbitration, where a split panel found against Dow Corning. The court of appeals correctly determined that the policies' arbitration clause provides for non-binding arbitration and that Dow Corning is now entitled to pursue its coverage claim in court.

1. The Arbitration Agreement. The arbitration clause included in the boilerplate of Safety's insurance policies for 1983-84 provides that the parties will proceed with arbitration "[a]s a condition precedent to any right of action under this Policy." Resp. App. 1a.[1] In addition to this affirmative recognition that post-arbitration litigation is permitted, the clause lacks any indication of arbitral finality. Notably, the arbitration clause does not: (i) state that the arbitrators' decision will be "final" or "binding"; (ii) incorporate by reference arbitration rules, such as the rules of the American Arbitration Association, that deem any arbitral award made under the rules to be binding; or (iii) provide for judicial enforcement of any arbitral award. Each of these three mechanisms is used in arbitration agreements to indicate that the parties intend the results of their arbitration to be binding.

2. The Arbitration Proceedings. On June 30, 1998, Dow Corning initiated proceedings against Safety

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[1] The Safety arbitration clause is reproduced in the Appendix to this brief.

pursuant to the arbitration agreement. Before a tribunal was empaneled, Dow Corning expressly reserved its rights to contest whether any arbitral decision would be binding and to litigate its coverage claim in court upon completion of the arbitration. *See* Pet. App. 7a-8a; C.A. App. 275-76, 318-19. Once the panel was in place, Safety attempted to submit the binding/non-binding issue to the arbitrators. Specifically, Safety asked the panel to rule that it had authority to decide whether its decision would be binding, and that its decision would in fact be binding on the parties. *See* C.A. App. 196-203. Over Dow Corning's opposition, the panel declared its "intent that its decisions . . . be deemed as binding upon the parties." C.A. App. 221.[2]

The final arbitration hearing took place in July 2001. The following month, the panel announced a 2-to-1 decision in Safety's favor. Pet. App. 86a-88a. The majority decision was issued by umpire James Lyon, who had been nominated by Safety (in three other coverage arbitrations as well as this one) and appointed by the functional equivalent of a "coin flip." *Id.*; *see also* Pet. App. 11a, 14a. Mr. Lyon, joined by Safety's party-appointed arbitrator, denied Dow Corning's $9.15 million coverage claim in its entirety, relying on an

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[2] Dow Corning opposed Safety's motion on the ground that the panel had no power to decide the binding/non-binding issue. *See* C.A. App. 205-17. Dow Corning expressly declined to brief the merits of the binding/non-binding issue to the arbitrators lest it risk a waiver of its argument that the issue was for a court to decide. *See id.* at 215.

The parties' disagreement over whether the arbitration would be binding was later reflected in a bankruptcy court stipulated consent order. *See* Pet. App. 7a-8a. Relying on incomplete quotations from this consent order, Safety argued below that the parties had agreed to submit to binding arbitration, altering the terms of their original agreement. The court of appeals read the relevant provision in full and correctly concluded that the consent order simply "preserved the parties' conflicting positions on this issue." *Id.* at 8a; *see also* Pet. App. 92a-93a.

interpretation of the "trigger of coverage" issue that departed from the breast implant judicial decisions, which uniformly recognize that policies in effect at the time of implantation are triggered. *Compare* Pet. App. 86a-87a *with, e.g., In re Silicone Implant Ins. Litig.*, 667 N.W.2d 405, 416-17 (Minn. 2003); *Dow Corning Corp. v. Continental Cas. Co.*, Nos. 200143-154, 1999 WL 33435067, at *6 (Mich. Ct. App. Oct. 12, 1999); *Bristol-Myers Squibb Co. v. AIU Ins. Co.*, No. A-145,672, slip op. at 7 (Jefferson Cty. Tex. Dist. Ct. May 3, 1996) (C.A. App. 145-49). The third arbitrator, who once served as New York's Superintendent of Insurance, "dissent[ed] vigorously" from the majority's take-nothing decision, describing the majority's trigger ruling as "bizarre" and contrary to the terms of the Safety policies. Pet. App. 89a-90a; C.A. App. 154.

3. Proceedings in the District Court. On October 31, 2001, Dow Corning filed a motion in the United States District Court for the Eastern District of Missouri to vacate the arbitration decision pursuant to Section 10 of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 10. Of importance to the present petition, Dow Corning challenged the arbitration decision on the ground that the arbitrators had exceeded their powers by deciding the binding/non-binding issue and by purporting to issue a binding award.

The district court agreed with Dow Corning that the binding/non-binding issue should be decided independently by the court. Pet. App. 38a. Without hearing oral argument, and relying on agreements made subsequent to the original arbitration clause, the district court concluded that the parties intended the arbitrators' decision to be binding. Pet. App. 37a-41a. The district court therefore denied Dow Corning's motion to vacate and dismissed the action. Pet. App. 85a.

4. The Court of Appeals' Decision. On appeal to the United States Court of Appeals for the Eighth Circuit, Dow Corning challenged the district court's determination

that the arbitration decision was binding on the parties. In its brief to the court of appeals and at oral argument, Safety did not challenge the district court's ruling that the binding/non-binding question was for the court to decide. The first time Safety raised the issue was months after oral argument in a Fed. R. App. P. 28(j) letter to the court. *See* Letter from Counsel for Safety to Michael E. Gans, Clerk of Court (June 27, 2003); Letter from Counsel for Dow Corning to Michael E. Gans, Clerk of Court (July 1, 2003).

In a unanimous decision written by Chief Judge Loken, the court of appeals modified the district court's order to reflect that "the excess liability policies provided for mandatory but non-binding arbitration." Pet. App. 6a. Analyzing the terms of the arbitration agreement, the court of appeals determined that "the parties contracted for non-binding arbitration," and that such contracts for mandatory, non-binding arbitration are enforceable under the FAA. Pet. App. 8a-10a. The court of appeals agreed with the district court that the arbitrators "doubtless exceeded their authority in declaring their decision to be binding," as this presented a question for the court. Pet. App. 8a.

Thereafter, the court of appeals denied Safety's petition for panel rehearing or rehearing *en banc*. Pet. App. 96a.[3]

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[3] Safety's petition for certiorari refers several times to *Shook & Fletcher Asbestos Settlement Trust v. Safety National Casualty Corp.*, No. 03-1092, 2003 WL 22391526, at *1 (8th Cir. Oct. 21, 2003) (Pet. App. 97a-99a), which was decided by the court of appeals shortly after it decided the instant case. *Shook & Fletcher* involved the same arbitration clause at issue here. As in the instant case, Safety secured an arbitration award from a divided panel, with Safety-nominated umpire Mr. Lyon again casting the tiebreaking vote in Safety's favor. *See* C.A. App. 181-82. Over the policyholder's objection, the arbitration panel held that its award was binding. On Shook & Fletcher's motion to vacate, the district court concluded that the arbitrators had exceeded their powers in reaching the binding/non-binding issue, and that the (continued...)

REASONS FOR DENYING THE WRIT

I. THE EIGHTH CIRCUIT PROPERLY ENFORCED THE PARTIES' AGREEMENT TO ENGAGE IN NON-BINDING ARBITRATION.

Safety asks the Court to grant its petition in order to hold that "There Is No Such Thing As Non-Binding Arbitration." Pet. 4. There is no basis for this request. The court of appeals' determination that parties may contract for mandatory but non-binding arbitration does not conflict with any decision of another court of appeals, and is strongly supported by decisions of this Court recognizing that the primary purpose of the FAA is to enforce the intentions of the parties as expressed in their arbitration agreement. Moreover, non-binding arbitration is a valid and recognized form of arbitration, and Safety is plainly wrong to deny its existence.

A. The Courts of Appeals Unanimously Agree That Parties To An Arbitration Agreement May Contract For Non-Binding Arbitration.

Safety has not cited a single circuit court decision refusing to enforce a contract for non-binding arbitration. Consistent with the decisions of the Eighth Circuit here and in *Shook & Fletcher*, every court of appeals to decide the issue has held that agreements to engage in mandatory, non-binding arbitration are valid and enforceable. In *United States v. Bankers Insurance Co.*, 245 F.3d 315 (4th Cir. 2001), the Fourth Circuit rejected the argument that an

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arbitration clause in Safety's policies provided for mandatory, non-binding arbitration. Pet. App. 98a. Citing its earlier decision in *Dow Corning*, the Eighth Circuit affirmed, *id.* at 98a-99a, and subsequently denied Safety's petition for panel rehearing and rehearing *en banc* on November 24, 2003.

agreement for non-binding arbitration is unenforceable, noting that "[m]andatory arbitration, as a prerequisite to initiation of litigation, and binding arbitration, where the parties must accept an award or decision of the arbitrator, are two different things." *Id.* at 321-22. In *Wolsey, Ltd. v. Foodmaker, Inc.*, 144 F.3d 1205, 1209 (9th Cir. 1998), the Ninth Circuit held that "arbitration need not be binding in order to fall within the scope of the Federal Arbitration Act. The FAA is no less applicable to [an agreement for non-binding arbitration] than it would be if the parties had agreed to submit to binding arbitration." In addition, the Third Circuit has upheld non-binding arbitration in the collective bargaining context. *See Orlando v. Interstate Container Corp.*, 100 F.3d 296, 300 (3d Cir. 1996). In language that directly supports the Eighth Circuit's approach, the Third Circuit in *Orlando* held that "[t]he omission of any indication that arbitration proceedings should be final and binding leads us to conclude that, if we nevertheless declared them to be so, we would not be enforcing the will of the parties, as expressed in their agreement." *Id.* at 301.

These judicial decisions – including decisions involving insurance-related arbitrations[4] – refute Safety's assertion that there is no such thing as non-binding arbitration. While it may be true that in "most" cases, "private agreements to arbitrate involve binding arbitration," Pet. 8 (quoting American Arbitration Ass'n, *Insurance ADR Manual*, § 4.03 at 57 (1993)), "most" is not "all," and "all" is the position Safety advances here. It simply does not follow

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[4] Safety's assertion that the court of appeals' decision in this case carves out an "insurance exception" to an otherwise applicable requirement of binding arbitration is incorrect. *See* Pet. 4. Like the Fourth Circuit in *Bankers*, the Eighth Circuit in this case and in *Shook & Fletcher* has placed insurance-related arbitration agreements on exactly the same footing as other arbitration agreements, by enforcing them according to their terms.

that private agreements to arbitrate *must* involve binding arbitration, and neither this Court nor any court of appeals has so held. To the contrary, courts have concluded that parties may contract for non-binding arbitration if they so choose.[5]

Other authorities, including prior decisions of this Court, confirm that non-binding arbitration not only exists, but is a widely recognized and valid form of arbitration. In *Teachers Union v. Hudson*, 475 U.S. 292 (1986), the Court recognized the desirability of an arbitral procedure that "would not receive preclusive effect in any subsequent"

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[5] Safety cites the Ohio Supreme Court's non-majority opinion (without identifying it as such) in *Schaefer v. Allstate Insurance Co.*, 590 N.E.2d 1242 (Ohio 1992), for the observation that "'[n]on-binding arbitration' is a contradiction in terms." Pet. 7 (citing *Schaefer*, 590 N.E.2d at 1245 (op. of Douglas, Sweeney and Resnick, JJ.)). *Schaefer* involved application of Ohio's arbitration statute, not the FAA, to an arbitration clause in an uninsured motorists policy that rendered awards above a certain threshold amount subject to trial de novo in court. *See* 590 N.E.2d at 1249 n.9 (op. of Douglas, Sweeney, and Resnick, JJ.). Three justices thought the clause was unenforceable because it prescribed a form of non-binding arbitration, *see id.* at 1244-50 (op. of Douglas, Sweeney, and Resnick, JJ.); three other justices thought the clause was unenforceable because it unfairly permitted trials de novo only for the benefit of the insurer, *see id.* at 1250-53 (op. of Wright, J., Moyer, C.J., and Brown, J., concurring in the judgment only); a seventh justice (Holmes, J.) dissented from the unenforceablity holding of the other six. Thus, only three of seven justices embraced the observation cited by Safety. The other grouping of three justices noted that the issue had not been briefed and stated that their brethren's views "will . . . be news to the parties in these cases, the trial courts and the courts of appeals below (not to mention the whole of the Ohio judiciary)" and "will no doubt come as a surprise to the General Assembly, which has used one or both of the terms 'binding' and 'non-binding' to modify arbitration in no fewer than ten sections of the Ohio Revised Code." *Id.* at 1250 (op. of Wright, J., Moyer, C.J., and Brown, J., concurring in judgment only). In any event, Ohio follows the "syllabus rule," and the propositions cited by Safety do not appear in any Ohio case syllabus. *See* Ohio Sup. Ct. R. Rpt. 1(B).

judicial action. *Id.* at 308 n.21. More recently, in *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998), the Court considered whether a "nonbinding" arbitration procedure had to be exhausted as a predicate to judicial action. *Id.* at 878-79 & n.5. Neither the majority nor the dissenting opinion suggested that an agreement to engage in non-binding arbitration would be unenforceable or that non-binding arbitration was a contradiction in terms. *Id.*; *see id.* at 881 (Breyer, J., dissenting); *see also Bartnicki v. Vopper*, 532 U.S. 514, 519 (2001) (referring to a "nonbinding arbitration proposal"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 827 (1999) (describing "mediation, arbitration, and a settlement conference" as a prelude to litigation); *id.* at 870 (Breyer, J., dissenting) (noting that global settlement of asbestos-related litigation provided for "mediation and nonbinding arbitration").

In addition, non-binding arbitration is a mainstay of the federal court-annexed alternative dispute resolution program established by Congress and codified at 28 U.S.C. §§ 654-657. Under this program, a district court, with the parties' consent, may refer a civil action to "arbitration." *Id.* § 654(a). Within 30 days after the resulting arbitral award, "any party may file a written demand for *a trial de novo in the district court*," upon which "the action shall be restored to the docket of the court and treated for all purposes as if it had not been referred to arbitration." *Id.* § 657(c) (emphasis added). As the Federal Judicial Center has explained, "[u]nlike mediation, arbitration is an adjudicatory, rights-based process. In federal court-based arbitration, one or three arbitrators hear adversarial presentations, usually in summary form, by each side to the litigation and then issue a *nonbinding* 'award,' or decision, on the merits . . . . Either party may reject the award and request a *trial de novo* in the district court." Federal Judicial Center, *Guide to Judicial Management of ADR* 130 (2001) (emphasis added).

Commentators likewise recognize both the existence and legitimacy of non-binding arbitration. As one commentator explains: "Parties may provide that an arbitration is entirely non-binding. In that event, if the parties do not voluntarily comply with the award, or otherwise settle their dispute, litigation may proceed as if no arbitration proceedings had occurred." Steven C. Bennett, *Arbitration: Essential Concepts* 81 (2002); *see also* Thomas J. Stipanowich, *Commercial Arbitration at Its Best: Successful Strategies for Business Users* § 1.11, at 27 (2001) (noting the use of "non-binding abbreviated arbitration" as an alternative to binding arbitration). The term "non-binding arbitration" has also worked its way into the vernacular of arbitral administering organizations such as JAMS. *See* JAMS Glossary of ADR Terms (2001) (available at http://www.jamsadr.com/images/PDF/PressKit/jams_glossary.pdf) (last visited Jan. 28, 2004) (noting that arbitration "can be binding or non-binding," and defining "non-binding arbitration" as "[a] hearing process that looks and feels like arbitration, but is advisory and non-binding").

In sum, non-binding arbitration exists and has been accepted by this Court, the courts of appeals, Congress, commentators, and the ADR community as a valid procedure. Every court of appeals to consider the issue has held that an agreement providing for mandatory but non-binding arbitration should be enforced according to its terms.

To the extent that Safety asserts a fallback argument that the court of appeals should have applied at least a presumption that the parties here intended the arbitration decision to be binding, that argument also does not warrant review. While some courts have suggested such a presumption in dicta, they did so in the context of arbitration agreements that expressly provided for binding arbitration by incorporating American Arbitration Association rules to that effect. *See McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 984-85 (5th Cir. 1995); *Rainwater v. Nat'l Home*

Ins. Co., 944 F.2d 190, 193-94 (4th Cir. 1991); *P&P Indus., Inc. v. Sutter Corp.*, 179 F.3d 861, 867 (10th Cir. 1999).[6] By contrast, Dow Corning and Safety neither incorporated the American Arbitration Association rules by reference nor gave any other indication that they intended an arbitral decision to be final and binding. Pet. App. 4a. Moreover, the arbitration clause in this case contains affirmative indications that the parties did not intend to give binding effect to the arbitrators' decision (*e.g.*, it provides that arbitration is a condition precedent to litigation, and it also provides for a panel composed exclusively of insurance industry insiders). *See id.* at 5a-6a. Accordingly, even if there were a well-developed circuit conflict (which there is not) on the question whether parties to an arbitration agreement presumptively intend to be bound by an arbitral decision, this case would not provide an appropriate vehicle for resolving such a conflict.

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[6] There is no indication that the parties in the other case cited by Safety for this proposition, *Chicago Typographical Union No. 16 v. Chicago-Sun Times, Inc.*, 935 F.2d 1501 (7th Cir. 1991), contested the binding nature of the arbitration provision involved; the dispute there focused on the conduct of the arbitrator.

B. The Court of Appeals' Decision Is Consistent With This Court's Decisions Holding That Arbitration Agreements Should Be Enforced According To Their Terms.

Throughout its petition, Safety insists that the general federal policy in favor of arbitration is actually a federal policy in favor of arbitrations that yield binding awards. In advancing this supposed policy, Safety completely overlooks the primary policy behind the FAA: the enforcement of arbitration clauses according to their terms. That policy, repeatedly articulated by this Court, controls in this case.

As the Court explained in *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468 (1989), "[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate." *Id.* at 476; *see also Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 53-54 (1995) ("the central purpose of the Federal Arbitration Act [is] to ensure that private agreements to arbitrate are enforced according to their terms" (internal quotation and citation omitted)). This Court repeatedly has held that arbitration under the FAA "is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt*, 489 U.S. at 479; *see also EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002).

This Court has recognized that the parties' intentions are of primary importance even when they conflict with other FAA policy goals, such as expedited dispute resolution. *See Volt*, 489 U.S. at 479. "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered, and that concern requires that we rigorously enforce agreements to arbitrate, even if the result

is 'piecemeal' litigation." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221 (1985). "After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes ... but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 947 (1995) (internal quotations and citations omitted).

Safety runs head-first into these decisions by asserting that courts should refuse to enforce the parties' intention to provide for mandatory but non-binding arbitration. The court of appeals, in contrast, adhered to the decisions of this Court by enforcing the parties' intentions as expressed in the arbitration clause. *See* Pet. App. 4a ("As this is a question of the contracting parties' intent, we begin with the terms of the arbitration clause in the insurance policies.").

C. The Court of Appeals' Application Of The Arbitration Clause At Issue In This Case Is Correct And Warrants No Further Review.

The court of appeals' fact-bound determination that the particular arbitration clause at issue in this case expresses the parties' intent to provide for mandatory but non-binding arbitration warrants no further review. The court of appeals correctly focused on the language of the arbitration clause, which differs from the many arbitration agreements that expressly provide "that the arbitration award will be 'final and binding,'" or that incorporate by reference "the rules of the American Arbitration Association or a similar arbitral body that expressly provide for binding arbitration." Pet. App. 4a; *see also Orlando*, 100 F.3d at 301 ("omission of any indication that arbitration proceedings should be final and binding" is dispositive); *Eaton v. Courtaulds of N. Am., Inc.*, 578 F.2d 87, 90 n.1 (5th Cir. 1978) (de novo judicial

review appropriate where arbitration agreement did not "explicitly make the arbitrator's decision binding on the parties"). The court of appeals noted that Safety failed to cite a single federal case "in which an arbitration agreement *entirely silent on this question* was construed as providing for binding arbitration." Pet. App. 6a (emphasis in original). Nor has Safety cited such a case in its petition.

In addition to noting the absence of language suggesting finality or a binding effect, the court of appeals recognized that the "condition precedent" language "suggests that arbitration of a policy dispute will be followed by litigation, and thus is non-binding," although the court found that this language is not conclusive. Pet. App. 5a. The court also focused on the requirement that all three arbitrators be insurance or reinsurance officials. Pet. App. 6a. The court of appeals recognized that this arrangement – borrowed from arbitration agreements between insurance companies and their reinsurers – provided "a decidedly pro-insurer 'tilt' to the proceedings," and that, at the time of contracting, a policyholder such as Dow Corning would have been "unlikely to agree that the results of such a proceeding will be binding, that is, judicially unreviewable on the merits under the FAA." *Id.*[7]

There is no basis for Safety's assertion that "[t]he Eighth Circuit's opinion will be precedent for all 'losers' to contend that arbitration is a prelude to litigation." Pet. 4; *see*

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[7] As the court of appeals noted, neither party submitted custom and usage evidence that shed light on the binding/non-binding issue. Pet. App. 5a-6a. Moreover, the court of appeals pointed out that it was Safety, not Dow Corning, that drafted the arbitration clause. Pet. App. 6a. "[T]he common-law rule of contract interpretation that a court should construe ambiguous language against the interest of the party that drafted it" applies with equal force to arbitration agreements. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995).

also id. ("challenges to the binding nature of arbitration will be *de rigueur*"). The overwhelming majority of arbitration clauses leave no question one way or the other as to the final and binding nature of resulting awards. Where clauses affirmatively recognize a right to sue and fail to provide for final and binding awards, the Eighth Circuit opinion – together with the opinions of the Third, Fourth, and Ninth Circuits – will have the salutary effect of discouraging companies in Safety's position from trying to deprive litigants of a judicial forum in instances where they have not agreed that arbitration decisions will be final and binding.

The court of appeals' analysis of Safety's arbitration clause in this case and in *Shook & Fletcher* is entirely reasonable and does not conflict with the decisions of this Court or any other court of appeals. Nor does it have any far-reaching consequences for other arbitrating parties. Ultimately, this is a localized dispute concerning certain Safety insurance policies that warrants no further review.

II. THE EIGHTH CIRCUIT CORRECTLY DETERMINED THAT THE PARTIES DID NOT AGREE TO SUBMIT THE BINDING/NON-BINDING ISSUE TO THE ARBITRATORS.

The court of appeals and the district court both held that Dow Corning and Safety had not agreed to submit the question of whether their arbitration was binding or non-binding to the arbitrators, and therefore the issue was for the court to decide independently. *See* Pet. App. 8a ("The arbitrators doubtless exceeded their authority in declaring their decision to be binding, because that issue goes to the scope of their authority."); Pet. App. 38a ("The policy provision, however, does not state that it is within the arbitrators' authority to determine whether their decision is binding. Therefore, pursuant to *First Options*, this court will decide the issue 'independently.'"). The court of appeals' resolution of this issue is correct and does not conflict with

any decision of this Court or another court of appeals. No further review is warranted.

A. No Circuit Split Exists On The Question Of Who Decides Whether An Arbitration Award Is Binding.

Notably absent from the petition is any hint of a circuit split on the question of who decides whether an arbitration award is binding. In fact, the only circuits that have squarely decided the issue – the Eighth Circuit in the instant case and in *Shook & Fletcher*, and the Third Circuit in *Orlando* – both have held that the binding/non-binding determination belongs to the court. *See Dow Corning*, 335 F.3d at 747 (Pet. App. 8a); *Shook & Fletcher*, 2003 WL 22391526, at *1 ("the issue whether the parties contracted for binding or non-binding arbitration went to the scope of the arbitrators' authority and was therefore beyond their authority to resolve") (Pet. App. 98a-99a); *Orlando*, 100 F.3d at 300 ("because the court must determine the duty to arbitrate from an interpretation of the collective bargaining agreement, it also has the task of determining the dispositive effect to be given to an award – again, by construing the contract").

This result is consistent with decisions of other circuits holding more generally that a court decides questions of arbitrator authority and jurisdiction absent a clear agreement to the contrary. *See, e.g., Carson v. Giant Food, Inc.*, 175 F.3d 325, 330 (4th Cir. 1999) ("if contracting parties wish to let an arbitrator determine the scope of his own jurisdiction, they must indicate that intent in a clear and specific manner"); *Gen. Motors Corp. v. Pamela Equities Corp.*, 146 F.3d 242, 248 (5th Cir. 1998) ("the law creates a presumption that the parties did not agree to submit any question as to the arbitrator's own power to that very same arbitrator"); *Int'l Ass'n. of Machinists & Aerospace Workers*

v. Gen. Elec. Co., 865 F.2d 902, 904 (7th Cir. 1989) ("[t]he arbitrator is not the judge of his own authority").

These judicial authorities, in turn, are consistent with the text of Section 9 of the FAA itself, which provides that "*[i]f the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration*, and shall specify the court, then at any time within one year after the award is made any party to the arbitration *may apply to the court so specified for an order confirming the award* . . . ." 9 U.S.C. § 9 (emphasis added). The first italicized phrase indicates that the parties must affirmatively agree that a judgment of the court shall be entered upon the award made, *i.e.*, that the award will be binding. The arbitration clause at issue in this case includes no such provision. The second italicized phrase indicates that it is judicial confirmation that makes an arbitration award enforceable, and therefore a court alone has the power to give an arbitration award binding effect.

Safety's own authorities confirm that the court of appeals' decision is correct. Not one of the cases cited by Safety in the petition involves a court deferring to the decision of an arbitrator on the binding/non-binding issue. To the contrary, every opinion cited by Safety ostensibly for implicating a binding/non-binding issue involves a court – and *not* an arbitrator – making the binding/non-binding determination.[8] Safety's contention that the arbitrator decides, absent a specific directive to that effect from the parties, is not the law anywhere.

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[8] *See, e.g., P & P Industries, Inc. v. Sutter Corp.*, 179 F.3d 861, 867-68 (10th Cir. 1999); *Rainwater v. Nat'l Home Ins. Co.*, 944 F.2d 190, 192-94 (4th Cir. 1991); *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 983-84 (5th Cir. 1995).

B. The Eighth Circuit's Decision Does Not Conflict With This Court's Arbitrability Decisions.

Safety's claim that this Court's decisions dictate a contrary result is without merit. Because arbitration is "simply a matter of contract between the parties," this Court repeatedly has held that "a party can be forced to arbitrate only those issues it specifically has agreed to submit to arbitration." *First Options*, 514 U.S. at 945; *see also AT & T Tech., Inc. v. Communications Workers of Am.*, 475 U.S. 643, 648-49 (1986). Where, as here, the question is whether the parties have agreed to allow the arbitrators to "decide the scope of their own powers," the presumption under this Court's precedents is that they have not. *First Options*, 514 U.S. at 945. It follows that, absent "clear and unmistakable" evidence of contrary intent, a court, not the arbitrator, decides the scope of the arbitrator's authority. *Id.* This is precisely what the Eighth Circuit has done here by answering the binding/non-binding question itself.[9]

Nothing in this Court's more recent pronouncements on arbitrability alters this result. Safety alleges a conflict between the court of appeals' decision and a trio of recent decisions by this Court: *Pacificare Health Systems, Inc. v. Book*, 538 U.S. 401, 123 S. Ct. 1531 (2003); *Green Tree Financial Corp. v. Bazzle*, 123 S. Ct. 2402 (2003); and *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79 (2002). But none of these cases presented the issue decided by the

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[9] Safety contends that because the arbitration clause called for the parties to arbitrate "any dispute" between them, the arbitrators and not the court were to determine whether the arbitration would be binding. Pet. 10-11. This unsupported assertion is undermined by *First Options* itself, where the clause in question similarly provided for the arbitration of "any controversy" arising out of the agreement between the parties. *See* Br. for Pet., *First Options Inc. v. Kaplan*, No. 94-560, at 4.

court of appeals – namely, whether the court or the arbitrators should decide whether the parties have agreed to binding arbitration. *Pacificare* involved the ability of arbitrators to award treble damages under the RICO statute, and the Court specifically declined to reach the ultimate arbitrability issue. *See* 123 S. Ct. at 1534-36. *Green Tree* dealt with the authority of arbitrators to order class arbitration, 123 S. Ct. at 2407, and *Howsam* concerned the power of arbitrators to interpret and apply the statute of limitations provision in the arbitration rules of the National Association of Securities Dealers, 537 U.S. at 82-83.[10] Because these issues are not presented in the instant case, there is no conflict.

To the extent that Safety tries to cast doubt on the court of appeals' decision by extrapolating from this Court's recent decisions an abstract principle governing the division of authority between courts and arbitrators, this effort also fails. This Court has not announced any principle, abstract or otherwise, that would dictate sending the binding/non-binding issue to the arbitrators under the arbitration terms agreed upon by Dow Corning and Safety If there is any principle to be gleaned from the Court's recent holdings, it is that whether a given issue is for the court or for the arbitrators to decide comes down to what the parties would have expected at the time of contracting. *See Pacificare*, 123 S. Ct. at 1536 n.2 (decision by a court is appropriate in the first instance "where contracting parties would likely have expected a court to have decided the gateway matter, where

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[10] Like most arbitration clauses today, the clause in *Green Tree* provided for the resolution of disputes "by *binding* arbitration" – language missing from Safety's policies. *Green Tree Fin. Corp. v. Bazzle*, 123 S. Ct. 2402, 2405 (2003) (emphasis added). Similarly, the clause in the provision at issue in *First Options* stated that "[t]he parties hereto and all who may claim under them shall be conclusively bound by such arbitration." Br. for Pet. in No. 94-560, at 4.

they are not likely to have thought that they had agreed that an arbitrator would do so, and, consequently, where reference of the gateway dispute to the court avoids the risk of forcing parties to arbitrate a matter that they may well not have agreed to arbitrate" (quoting *Howsam*, 537 U.S. at 83-84)). It is untenable to suggest that Dow Corning and Safety – having agreed to non-binding arbitration as a prelude to litigation – would have intended for arbitrators to have the power preemptively to declare their decisions to be binding. No further review is warranted.[11]

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[11] Safety's petition frames a third question presented concerning the standard of review applied by the court of appeals. *See* Pet. i. In fact, this third question adds nothing to the first two questions presented. To the extent Safety contends that the court of appeals applied the wrong standard of review to the decision of *the district court*, this contention is not well developed in the petition and is entirely erroneous. The court of appeals correctly applied ordinary standards of appellate review, as prescribed by this Court in *First Options*. *See First Options*, 514 U.S. at 948 ("courts of appeals should apply ordinary, not special, standards when reviewing district court decisions upholding arbitration awards"). To the extent Safety contends that the court of appeals applied the wrong standard of review to the decision of *the arbitrators*, this is simply another way of saying that the arbitrators, not the court, had the power to decide the binding/non-binding issue. Precisely because the binding/non-binding issue was properly for the court under the parties' agreement, the Eighth Circuit was not bound to defer to the arbitrators' *ultra vires* ruling on the issue. *See id.* at 943 ("If, on the other hand, the parties did not agree to submit the arbitrability question itself to arbitration, then the court should decide that question just as it would decide any other question that the parties did not submit to arbitration, namely independently.").

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

Mitchell F. Dolin
Counsel of Record
Robert A. Long
R. Laird Hart
Benjamin C. Block
COVINGTON & BURLING
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2401
(202) 662-6000

David E. Finkelson
RAY QUINNEY & NEBEKER
36 South State Street
Suite 1400
Salt Lake City, UT 84111
(801) 532-1500

Attorneys for Respondent

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APPENDIX

11. Arbitration: As a condition precedent to any right of action under this Policy, any dispute arising out of this Policy shall be submitted to the decision of a board of arbitration. The board of arbitration will be composed of two arbitrators and an umpire, meeting in St. Louis, Missouri, unless otherwise agreed.

The members of the board of arbitration shall be active or retired, disinterested officials of insurance or reinsurance companies. Each party shall appoint its arbitrator, and the two arbitrators shall choose an umpire before instituting the hearing. If the respondent fails to appoint its arbitrator within four weeks after being requested to do so by the claimant, the latter shall also appoint the second arbitrator. If the two arbitrators fail to agree upon the appointment of an umpire within four weeks after their nominations, each of them shall name three, of whom the other shall decline two and the decision shall be made by drawing lots.

The claimant shall submit its initial brief within twenty (20) days from appointment of the umpire. The respondent shall submit its brief within twenty (20) days after receipt of the claimant's brief and the claimant may submit a reply brief within ten (10) days after receipt of the respondent's brief.

The board shall make its decision with regard to the custom and usage of the insurance and reinsurance business. The board shall issue its decision in writing based upon a hearing in which evidence may be introduced without following strict rules of evidence but in which cross examination and rebuttal shall be allowed.

If more than one Insured is involved in the same dispute, all such Insureds shall constitute and act as one party for purposes of this Clause and communications shall be made by the Company to each of the Insureds constituting the one party; provided, however, that nothing therein shall impair

the rights of such Insureds to assert several, rather than joint, defenses or claims, nor be construed as changing the liability of the Insureds under the terms of this Policy from several to joint.

Each party shall bear the expense of its own arbitrator and shall jointly and equally bear with the other party the expense of the umpire. The remaining costs of arbitration shall be allocated by the board.